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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1964

No. 446

MOONEY AIRCRAFT, INC.,

Petitioner,

V.

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,

Respondents.

Brief In Opposition To Petition Of Writ Of Certiorari

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CLEMENS PRINTING CO., SAN ANTONIO, TEXAS

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To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents, Delray Beach Aviation Corporation and Bert Boldt, pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, be denied.

I.

GROUNDS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Petitioners have not been deprived its rights under the due process clause of the Constitution of the United States in that all necessary elements for the Florida Court to render judgment were existent.

II.

ARGUMENT

Petitioners, in its Petition for Writ of Certiorari, seek to invoke the jurisdiction of this Court solely upon the grounds that it was denied its rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Since the case of **International Shoe Co. v State of Washington**, 326 U.S. 310, 66 S.Ct. 154, decided in 1945, there has been a clear and distinct trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. Numerous states have enacted statutes in light of this trend in order to "exploit to the maximum the fullest permissible reach under federal constitutional restraints". **Lone Star Motor Import, Inc., v. Citroen Cars Corp.**, 288 F.2d 69 72-73. (Fifth Cir. 1961).

In 1957, Fla. Stat. Sec. 47.16 (2) was enacted, and the Florida legislative intent to extend jurisdiction within constitutional limits was clearly set forth by the preamble which immediately preceded this enactment. This statute and the legislative intent were accorded great weight by the Honorable Judge John R. Brown, writing the opinion for the Fifth Circuit in the instant case, and are fully set out in

detail. **Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.**, 332 F. 2d 135, 138 (note 9 & 10).

Petitioners contend in their brief that they did not have the requisite "minimum contacts" within the State of Florida, and therefore, were not subject to the jurisdiction of the Florida Court. This position is totally untenable for two reasons.

(1) The record clearly reveals that Mooney Aircraft, Inc., through Richard Martin, a representative acting either for Mooney Aircraft, Inc., or Mooney Sales Co., its exclusive sales outlet, had sufficient contacts with the State of Florida to satisfy the "minimum contacts" test. (R. p. 280 - 283 incl.).

Counsel for petitioners goes to great extent to distinguish between Mooney Aircraft, Inc., and Mooney Sales Co., but as succinctly noted by Judge Brown in his opinion, there was no contractual relationship between Metropolitan, the distributor, and Mooney Sales Co. **Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.**, supra, (p. 140, n. 15). The record further discloses that Mooney Sales Co. was not even in existence at the time of the contract between Metropolitan and Mooney Aircraft, Inc., and at the time of its execution, Richard Martin was sales manager of Mooney Aircraft, Inc. (R. p. 286). Any arrangements or agreements made between Mooney Aircraft, Inc., and Mooney Sales Co. subsequent to the date of the contract in question, certainly could not alter the terms or relationship between Mooney Aircraft, Inc., and Metropolitan.

(2) The Florida Statute does not require that the foreign corporation "itself" be doing business within the state, but only that they be transacting business through distributors, jobbers, wholesalers or brokers. The effect of this statute, however, has been cautiously restricted by the Florida

Courts who place the burden on the resident to show that the foreign corporation has "some degree of control over the brokers, jobbers, wholesalers, or distributors". **Fawcett Publications, Inc., v. Rand,** (Fla. App. Third District, 1962), 144 So. 2d 512. This restriction has been made by the courts for the sole purpose of preventing this statute from being too broad and thereby denying a person his constitutional rights under the due process clause. The Florida Courts have felt compelled to give "full effect" to this statute but only after sufficient facts are presented showing the "control" a foreign corporation is "capable of exercising" over the local agency. **Deere and Co. v. Watts,** (Fla. App. Third District, Jan. 1963), 182 So. 2d 529.

It was stipulated by all parties that Metropolitan Aircraft Corp. was doing business in the State of Florida as a distributor for Mooney Aircraft, Inc., in accordance with the terms of Defendants' Exhibit B. (R. p. 47). As stated by Judge Brown, "the evidence overwhelmingly demonstrates that Mooney Aircraft, Inc., had the requisite "control" over Metropolitan, its distributor. **Delray Beach Aviation Corp., v. Mooney Aircraft, Inc.,** supra (p. 140).

Petitioners have consistently taken the position, as they do now, that the mere fact that they entered into a so-called distributorship contract, this alone prevents them from being subjected to the jurisdiction of the Florida Courts. This contention completely ignores the Florida Statutes as well as the terms of the contract itself which retains numerous details of control over the distributor which Mooney Aircraft was **capable of exercising.** (emphasis ours) Petitioners attempt to stress that, even though the contract makes provision for certain control by Mooney over its distributor, they did not in fact elect to exercise these rights. This argument is very weak and certainly

without substance since surely the test must be what control Mooney was capable of exercising, rather than what they, themselves, chose to exercise.

Needless to say, this is not the first instance wherein a foreign corporation has sought to set up a subsidiary or distributor as a subterfuge and thereby circumvent state statutes. In the cases of **Facht v. Southwestern Skyways, Inc., v. Cessna Aircraft Co.,** (D. Colo. 1963) 220 F. Supp. 441; **Fiat Motor Co. v. Alabama Imported Cars, Inc.,** 292 F. 2d 745 (D.C., 1961); **Florio v. Power Powder Tool Corp.,** 248 F. 2d 367 (Third Cir. 1957): this very contention was made, and in each instance, the courts upheld the constitutionality of the State Statute and held that the distributorship contracts were so restrictive and exercised, or were capable of exercising, so much control, the foreign corporations themselves were in effect doing business within the various states.

III.

CONCLUSION

Petitioners are contending they have been deprived of due process. Under the holding of the **International Shoe Co. v. State of Washington,** supra.

> "Due process requires only that, in order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he has certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice".

As noted by the Court in **McGee v. International Life Insurance Co.,** (1957) 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223, if the non-resident has actual notice and a reasonable

opportunity to defend, the requirement of the Fourteenth Amendment as to due process, has been complied with.

There is no question in the instant case about actual notice, nor a reasonable opportunity to defend. Failure to appear was solely the result of a calculated and intentional decision to completely ignore the suit.

Respondents are well aware that the present trend toward expansion of jurisdiction has not removed all restrictions as held in the case of **Hanson v. Denckla,** (1958) 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, but under the foregoing circumstances, Respondents contend they have met the burden of proving that the petitioners had the required "minimum contacts" within the State of Florida, and therefore, petitioners have not been denied due process in any respect. Accordingly, Respondents respectfully pray that the Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE

I certify that a true copy of the above has been mailed to Mr. Hal Rachal, Box 872 Midland, Texas, Attorney for Petitioners on this day of September, 1964.

Robert B. Thornton